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IN THE

Supreme Court of the United States

December Term, 1968

No. 718

WILLIAM J. DAWSON,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for a Writ of Certiorari to The United States Court of Appeals for the Second Circuit.

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Supreme Court of the United States

December Term, 1968

No.

William J. Dawson — *Petitioner,*

against

United States of America, — *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Your Petitioner, William J. Dawson, hereby petitions for a Writ of Certiorari to review the decision of the United States Court of Appeals, Second Circuit, affirming the conviction of Petitioner for violating 26 U.S.C. Section 7201 by filing false and fraudulent income tax returns for the years 1959 and 1961 and thereby willfully attempting to evade the taxes rightfully due in each of those years.

OPINION BELOW

The judment of the Distrtrict Court was rendered June 22, 1966. There was no opinion of the Court of Appeals for the Second Circuit, has not yet been officially reported.

JURISDICTION

The order sought to be reviewed was entered on August 12, 1968. An order denying a timely motion for a rehearing was made September 9, 1968. On September 27, 1968 Mr. Justice Harlan of this Court granted an order extending the time for filing a petition for Writ of Certiorari up to and including November 8, 1968. The statutory provision believed to confer on this Court jurisdiction to review the judgment in question is 28 U.S.C. 1254 (1).

QUESTIONS PRESENTED FOR REVIEW

1. If someone is being investigated by the Fraud Squad of the Internal Revenue Service for possible tax evasion and he retains an attorney, will evidence be admissible when it stems from an interrogation made of the suspect during the accusatory stage, by government attorneys, when retained counsel is not present and the government knows that counsel has been retained and when such questioning violates Canon "9" of both the American

Bar Association and New York State Bar Association Canons of Ethics?

2. If a defendant is being tried on charges of tax evasion and wishes to prove that the accusation is discriminatory in its nature since no other persons in like circumstances have ever been tried or accused of income tax evasion because the Internal Revenue Service in the past has treated such funds as non-taxable income; is it a violation of the Fifth and Sixth Amendments to the United States Constitution for the District Court Judge to quash a subpoena of the District Director of Internal Revenue to ask him whether anyone else who had received and used funds in like circumstances was ever held to have received taxable income, failed to report it and was therefore indicted?

3. If a defendant is indicted for income tax evasion and the government tries to prove its case by the net worth method, is it reversible error for the Court to deny admission of records kept by the defendant which show that the increase in net worth was from a non-taxable

source; viz: political contributions?

4. If, in a tax evasion trial, the government introduces by means of a series of charts keyed to the testimony already introduced, summaries of the taxable income it claims defendant received, and showing income for which it is claimed defendant should have reported income taxes due, the summaries being computed by the net worth plus non-deductible expenditures method, is it proper for the trial court to deny admission to defendant's own interpretation of the same summaries of his income by the use of the same charts but showing wherein defendant disagrees with the government's summaries and that he had actually overpaid upon his taxes, on the ground that such proof is improper because defendant was not an expert and defendant might try to introduce this proof later in the trial?

5. If a defendant in a tax evasion case had been convicted of tax fraud for the year 1961 and if it appears that the conviction rested on the theory that the income he did not report consisted of political contributions given

to him while he was chairman of the Democratic Party of the City of Cohoes, that he used in a corporation which published a newspaper espousing the Democratic cause, but in which he owned a substantial interest, did this change the nature of these funds from non-taxable to taxable, and under what circumstance does such a conversion take place?

6. When, in a tax evasion case, the government's own testimony clearly shows that a second audit of the taxpayer's records was made without fulfilling the requirements of Section 7605 (b) of the Internal Revenue Code, is it error for the trial judge to refuse to suppress all evidence resulting from the second audit?

7. Consider a tax evasion case in which the government seeks to prove that the defendant, while serving as a political leader, accepted a payment from a realty company which wanted immediate construction of certain water and sewage facilities by the city, and failed to report the income. If the man who is reputed to have handed over the payment testified that he gave an en-

velope containing $1,750.00 in cash, is evidence that some corporation had a cash disbursement on its books noted as "Coffees for water" admissible and is a corporation cancelled check made out to cash, admissible as corroboration of this transaction or is it irrelevant inadmissable self serving and pure hearsay.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

AMENDMENT V

1. ...nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law...

AMENDMENT VI

2. In all criminal prosecutions the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed...to have compulsory process for obtaining witnesses in his favor and to have the assistance of counsel for his defense.

3. INTERNAL REVENUE CODE § 7605 (b) Time and Place of Examination "No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

4. TIT. 28 # 1732 (a) U.S.C. Business Record Act "In any court of the United States and in any court established by an Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum of record of any act, transaction, occurrence, or event, shall be admissable as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event within a reasonable time thereafter..

"All other circumstances of the making of such

writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissability.

The term 'business', as used in this section, includes business, profession, occupation, and calling of every kind."

5. RULE 17 (c) FEDERAL RULES OF CRIMINAL PROCEDURE, 18 U.S.C. "...The court on motion made promptly may quash or modify the subpoena if compliance would be unreasonable or oppressive..."

CANONS OF PROFESSIONAL ETHICS

Canon 9, Negotiations with Opposite Party

A lawyer should not in any way communicate upon the subject of controversy with a party represented by counsel; much less should he undertake to negotiate or compromise the matters with him, but should deal only with his counsel. It is incumbent upon the lawyer most particularly to avoid everything that may tend to mislead a party not represented by counsel, and he should not undertake to advise him as to the law.

STATEMENT OF THE CASE

William J. Dawson, the Petitioner in this action, was, during the period of 1959 to 1961, the chairman of the Democratic Committee of the City of Cohoes, New York. On April 30, 1965, he was charged in a three count indictment with having violated Section 7201 of the Internal Revenue Code of 1954 in that he had willfully attempted to evade and defeat the income tax owed by him for the years 1959, 1960 and 1961, by filing false and fraudulent joint income tax returns for himself and his wife. Before indictment, he was well aware of an investigation by the Internal Revenue Service into his tax matters and retained first a local attorney from Troy, New York -- namely Seymore Fox and later a New York City attorney named Louis Bender, paying him $10,000.00 as a retainer. These attorneys filed written authorizations to act as his attorney with the Internal Revenue Service. The government attorneys knew that he had retained counsel but questioned the defendant at his home and at their offices in Albany, New York and Washington, D. C. and they questioned him without counsel present. This happened

on three separate occasions. Dawson did not wish to appear without counsel, and so informed the government attorneys. He told them he was there without his attorney because he could not afford to give them a further retainer and without it they would not appear. Fearful of being indicted, he appeared for questioning without counsel and gave damaging information against himself. He did not waive counsel but felt compelled to appear so that the government would not take further steps.

At the trial, the government sought to prove two specific items of income that petitioner did not report on his 1959 return. The first of these was a payment of $1,750.00 in cash, that was supposed to have been made to him by a partner in a realty firm who believed that Petitioner "ran things" in Cohoes and wanted prompt construction of certain water and sewage facilities. To corroborate the testimony of the man who claimed to have paid Dawson $1,750.00 in cash, the government introduced a cancelled check of a New York City corporation made out to cash and the books of a

New York City corporation which contained a cash disbursement marked "Cohoes for water". Timely objection was made but the evidence was held admissable.

A motion was also made by the Petitioner to supress other evidence about the 1959 return on the grounds that it had been obtained through a second audit made in violation of Section 7605 (b) of the Internal Revenue Code of 1954. This motion was denied. However, testimony at the trial proved conclusively that the evidence had, in fact, resulted from an illegal re-auditing of the taxpayer's 1959 records.

To prove evasion of income in 1960 and 1961, the government introduced summaries based on the net worth plus non-deductible expenditures method. The prosecuting attorneys tried to show that the taxable income was greater than that reported and suggested, as one possible source, that Petitioner had diverted political contributions to his personal benefit. To explain these charges, the Petitioner wished to introduce his own summaries, which accepted the government figures but interpreted them differently. However, he

was not permitted to do so on the grounds that his proof was out of order. He also sought to introduce the records of political contributions which he kept while serving as chairman of the Democratic Committee, but these were also rejected. Timely objection was made to both of these rulings.

The Petitioner also tried to use the affirmative defense of discrimination by proving two things:

1. That no other political leaders have ever been indicted on the theory that they had converted political funds because such a source of income had been considered non-taxable.

2. That the government had full knowledge of a number of political leaders, some of great prominence, who had committed the same or similar acts with political contributions and possessed all the material necessary but had never tried to indict them.

To establish this proof, the Petitioner served a subpoena during trial on the District Director of Internal Revenue, requested that he appear as a witness and bring with him "the names of any and all individuals

indicted for tax fraud by reason of their receipt of political donations from 1950 to the present". This subpoena was quashed.

The trial ended with the Petitioner being convicted on Counts 1 and 3 (1959 and 1961) and acquitted on Count 2 (1960).

REASONS FOR GRANTING THE WRIT

QUESTION PRESENTED: No. 1

If someone is being investigated by the Fraud Squad of the Internal Revenue Service for possible tax evasion and he retains an attorney, will evidence be admissible when it stems from an interrogation made of the suspect during the accusatory stage, by government attorneys, when retained counsel is not present and the government knows that counsel has been retained and when such questioning violates Canon "9" of both the American Bar Association and New York State Bar Association Canons of Ethics?

POINT I

WHEN GOVERNMENT ATTORNEYS KNOW THAT A SUSPECT HAS RETAINED COUNSEL TO DEFEND HIM, AN INTERROGATION OF THE SUSPECT DURING THE ACCUSATORY STAGE WITHOUT COUNSEL PRESENT IS INCONSISTENT WITH THE FIFTH AND SIXTH AMENDMENTS AND CANON "9" OF THE AMERICAN BAR ASSOCIATION AND NEW YORK STATE BAR ASSOCIATION'S CODE OF ETHICS SO THAT ANY RESULTING EVIDENCE OBTAINED SHOULD BE INADMISSIBLE AS A VIOLATION OF THE ACCUSED'S CONSTITUTIONAL RIGHTS.

On three separate occasions the proof in the case herein showed the defendant was questioned by the government attorneys, once at his home, once at the U. S. Attorney's office in Albany, New York and once in the U. S. Attorney's office in Washington, D. C. without his attorneys present and without their knowledge. Several famous U. S. Supreme Court decisions of the 1960's have examined the problem of rights belonging to a suspect who has no lawyer to defend him. This case offers the opportunity for this court to clarify the rights of one who does have counsel. In particular, there is the question of whether government attorneys can ignore the fact that the accused has counsel and question him alone. That this is contrary to custom

is not difficult to show. Consider, for example, the recent case of Coughlan v. United States 391 F 2d 371 (1968) The accused was interrogated in a jail cell after waiving his right to have his appointed attorney present. A confession was obtained and the United States Court of Appeals of the Ninth Circuit upheld the conviction. It did, however, make this remark:

"We on the other hand, do not want to be considered as lending our approval to the practice, if indeed a practice exists, of interviewing accused persons in jail in absence of counsel. The better, fairer and safer practice is to afford the defendant's attorney reasonable opportunity to be present."

A dissenting opinion expressed the view that the latter practice was the custom when it said:

"It will be observed that in both the Lee (322 F 2d 770) and Ricks (334 F 2d 964) cases, coming from different circuits, the court referred to a government concession that it is not the practice of the United States Attorney to permit any communication to be had by members of his staff or the police with a defendant

who is represented by counsel, except through or with the permission of counsel for the defendant. This causes one to wonder why this is the practice of two United States Attorneys and not all United States Attorneys. Or perhaps this represented a nationwide policy of the Department of Justice which, for some reason, was overlooked in the case now before us. If so, it may be that if Coughlan seeks certiorari, the Department of Justice will confess error."

It is also to be noted that in this district a United States Attorney recently refused to deal directly with the defendant. An accused named Silverstein announced before the Court that he had dismissed his counsel and wanted to talk freely but the government wouldn't respond. The case has not yet been reported.

In this case there was much less reason for the government to violate this custom than in the Coughlan case. Dawson, in this case, had not really waived counsel at all but had been forced by extraneous circumstances to submit to the interrogation without counsel. His lawyer, whom the government knew he had retained,

wanted an additional $10,000.00 retainer before he would sit in on the questioning. The suspect couldn't pay the sum. Fearful of being indicted, he felt compelled to appear for interrogation even without counsel. All of these facts were known to the U. S. Attorney at the time of the three questioning sessions of the defendant.

There is much reason to believe that this custom is really required by the Fifth and Sixth Amendments. Why, for example, should government attorneys interrogate a man without his counsel present unless they hope to obtain information through deceit or trickery, especially since Canon "9" insists that they deal with his lawyer? Consider the following remarks from recent cases.

"Therefore it becomes incumbent not upon the accused to insure that he is adequately represented, but upon his interrogator. Particularly when he had already retained counsel." Massiah v U. S. 377 US 201

"As is manifest our decision in Donovan sought to prohibit the police from questioning a suspect, in the

absence of counsel, after an attorney has been retained to represent him and has apprised the police of his retention." People v Gunner 15 N. Y. 2d 226, 232.

Canon "9" also insures that government attorneys maintain the practice of not interrogating an accused in the absence of counsel. "The codes of legal ethics are commonly recognized as establishing wholesome standards of professional action." Hunter v Troup 146 NE 321. It is also well known that a lawyer can be disbarred for violating them. Thus, though not formally enacted as statutes they have, for practical purposes, the effect of law.

It is respectfully pointed out to this court that Canon "9" is not drafted for the purpose of protecting lawyers -- but for the purpose of assuring to all the fair and equitable application of the law by its officers and agents to the public as a whole.

That Canon "9" was violated under the circumstances we are discussing is clear. It has been held, for example, in interpreting canons, that it is improper for a municipal attorney to permit police officers to obtain

written statements from persons having personal injury claims against the municipality when the attorney proves that the claimants are represented by counsel. See Formal Opinion 95, interpreting Canon "9", issued on May 3, 1933 by the Committee on Professional Ethics and Grievances of the American Bar Association, Opinion on Professional Ethics, American Bar Associates, 1967, 343 et seg. This committee also interpreted Canon "9" as providing that the attorney representing a plaintiff may not interview the defendant in the absence of his counsel concerning the facts of the case, even if the defendant is willing to discuss the matter. See Formal Opinion 108 American Bar Association, 1967, 359. It can be viewed as applicable in criminal proceedings as well.

"...should he (the accused) be allowed to obtain such representation (by counsel) and/or have had the foresight to secure counsel before his arrest, Canon "9" specifically forbids his interrogation by prosecuting attorneys." Dale W. Broeder: Wong Sun v US: A Study in Faith and Hope 42 Neb. Law Rev (1962-63) 483

at 601.

It has also been said:

"Presumably, legal ethics forbid a United States attorney or a Government agent to bypass the lawyers of a defendant fortunate enough to have the means to engage counsel. This is a proper ethic for lawyers." Lee v United States 5 Cir. 322 F 2d at 777.

This custom would seem to find its basis in constitutional rights concerning counsel. But it would also seem that the omnipresent character of Canon "9" means that a violation of it is contrary to the equal protection concept of due process. If government attorneys maintain the habit of making sure the accused's counsel is present when he is interrogated, it is unforgiveable that they should occasionably do otherwise. "Due process of law guaranteed by the amendment may be defined in terms of the equal protection of the laws, that is, as being secured by laws operating on all alike..." Vernon v State 18 SO. 2d 388.

In any event the taking of culpable statements from the defendant herein in violation of his Constitutional

rights and denying him the equal protection of the laws by not abiding by the bans of Section "9" of the Canon of Ethics requires a review of this ban by this Court to determine if defendant is entitled to a reversal of his conviction.

QUESTION PRESENTED: No. 2

If a defendant is being tried on charges of tax evasion and wishes to prove that the accusation is discriminatory in its nature since no other persons in like circumstances have ever been tried or accused because the Internal Revenue Service in the past has treated such funds as non-taxable income, is it a violation of the Fifth and Sixth Amendments to the United States Constitution for the District Court Judge to quash a subpoena of the District Director of Internal Revenue to ask him whether anyone else who had received and used funds in like circumstances was ever held to have received taxable income, failed to report it and had been indicted?

Point:

IF A DEFENDANT IN A TAX EVASION CASE WISHES TO RAISE THE DEFENSE THAT THE

PROSECUTION IS DISCRIMINATORY BECAUSE NOBODY UNDER CIRCUMSTANCES SIMILAR TO HIS WAS EVER INDICTED FOR TAX EVASION EVEN THOUGH MANY COMPARABLE INSTANCES WERE KNOWN TO THE GOVERNMENT, POLITICAL FUNDS HAVING IN ALL OTHER CASES BEEN CONSIDERED NON-TAXABLE INCOME, HE IS ENTITLED TO SUBPOENA THE DISTRICT DIRECTOR OF INTERNAL REVENUE FOR THE PURPOSE OF LAYING A FOUNDATION FOR SUCH EVIDENCE TO ASK HIM WHETHER ANYONE IN A SIMILAR POSITION HAS EVER BEEN INDICTED, AND FOR THE TRIAL COURT TO QUASH SUCH A SUBPOENA IS CONTRARY TO THE FIFTH AND SIXTH AMENDMENTS OF THE UNITED STATES CONSTITUTION.

During the years 1960 and 1961, William Dawson was chairman of the Democratic Committee of the City of Cohoes and had received political contributions for the Democratic Party in that city. Two counts of the three count indictment charged him with evading income in 1960 and 1961 and the government sought to show that this income had resulted from the diverting (embezzling) of political funds to his personal use. In addition to denying the truth of these assertions, the defendant wished to defend on the grounds that such a charge was discriminatory and contrary to the principles of Yick Wo v. Hopkins (118 U.S. 356). Defendant intended to prove that nobody else had ever been prosecuted for income tax

evasion on the theory that they had diverted political contributions received and used them as they were used by the defendant herein, even though it was common knowledge that many political leaders had done this, with the government being fully aware of the details in a number of such instances, some involving prominent men and much publicity. To give evidence of discrimination it became necessary to lay a foundation by showing the Internal Revenue Service holdings concerning others similarly situated; namely, that such funds had been deemed non-taxable. It was then necessary to show that the government is fully aware of many other people acting the same way and that it didn't prosecute them. (People v. Utica Daw's Drug Co. 16 A.D. 2d 12, New York). However, when the defendant served during trial a subpoena requiring that the District Director appear as a witness and bring with him "the names of any and all individuals indicted for tax fraud by reason of their receipt of political donations from 1950 to the present", a government motion to quash such subpoena was granted. This stopped the defendant from entering

any other proof of discrimination. That others had not been prosecuted was clearly immaterial and irrelevant and it must be assumed that the government attorneys would have raised such objection.

The trial court's decision to quash the subpoena denied defendant due process because it precluded the defendant from interposing the legitimate defense of discrimination. The defendant has a right to a jury determination of the validity of any recognized defense. This can be deduced from the decision in U.S. v England, another tax evasion case. In that case, the trial court charged the jury that as a matter of law, certain tax assessments made against the defendant were valid, leaving open only the question of whether there had been a willful attempt to evade. This was error. The Court of Appeals said:

"We hold that, in criminal prosecution of one charged with the commission of a felony, the defendant has an absolute right to a jury determination upon all essential elements of the offense. This right, emanating from the criminal defendants' constitutional right to trial by jury,

is neither depleted nor diminished by what otherwise might be considered the conclusive or compelling nature of the evidence against them" (U.S. v England 247 F. 2d 425), emphasis ours.

Also to be considered are these remarks:

"Under mandate of due process clause a person cannot be judicially deprived of his life, liberty or property, except by a tribunal which is able to give its attention to his case to consider it fully and to decide it solely upon its merits under the law." U. S. ex rel Leguillow v. Davis, D.C. Virgin Islands, 1953, 115F Supp. 392 (emphasis ours).

In view of these cases it becomes manifest that if the defendant wishes to raise the defense of "discrimination" it is obligatory on the court to permit the jury to hear the defense for, otherwise, it is not considering every aspect of the case. The defendant also had a right to have this subpoena granted on the grounds that good cause existed and any material and relevant compulsory process must be allowed by the court according to the Sixth Amendment. This can be seen from the following.

"Under the Sixth Amendment to the Constitution the defendants were entitled to have the assistance of counsel for their defense and also to have compulsory process for obtaining witnesses in their favor. To one accused of crime these are very substantial rights".

Paoni v. United States 281 F801, 803

"Rule 17 (c) is a statutory method of implementation of the Sixth Amendment".

United States v Echeles 222 F 2d, 144

"The defendant is entitled to the right to have compulsory attendance of witnesses and who they are to be is a matter for him and his counsel to decide.

U. S. v Davenport 312 F 2d 303, 305.

"We naturally appreciate that the Sixth Amendment's guaranty of compulsory process for an accused is, as the defense claims, a fundamental right and one which the courts should safeguard with meticulous care."

Feguer v United States 302, F 2d 214, 241

It can also be seen that good cause for the subpoena existed. The courts have held previously:

"Good cause for production of documentary evidence

within this rule requires a showing that the documents are evidentiary and relevant, that they are not otherwise procurable by the defendant by exercise of due diligence, that defendant cannot properly prepare for trial without such production and inspection and that the application is made in good faith and not intended as a general fishing expedition"

U. S. v Duncan D. C. N. Y. 1958, 222 F.R.D. 295

It is apparent that the information requested in the subpoena was not a fishing expedition. The defendant had a particular defense in mind which he could demonstrate in no other manner. The documents were evidentiary and relevant because they served to prove the defense. Furthermore there is no way in which the defendant can gather the needed information except by a subpoena of the District Director.

When we consider all this it would seem to be clear that the Court of Appeals was wrong when it reasoned that no prejudice resulted from whatever error the trial court made. The defendant had an absolute right to introduce this defense before the jury and to obtain com-

pulsory process in the aid of it. When a fundamental right is denied there is always prejudice.

In People v Zambounis, a classic case of the N. Y. Court of Appeals, the prosecutor filed an information which charged the defendant with distributing obscene literature but made no further effort to describe the contents of the literature. The Court of Appeals of New York reversed the conviction because the defendant had been denied the fundamental right of knowing the nature of the charge against him and of the act constituting it. It made no difference that the defendant actually knew the contents of the literature he was supposed to have distributed. This had to be in the information. The court said, "Forms and procedure still have their place and purpose in the administration of the law, without them we would have chaos... The requirement that an indictment and an information must state the crime with which a defendant is charged, and the particular acts constituting that crime, is more than a technicality; it is a fundamental, a basic principle of justice and fair dealing, as well as a rule of law."

People v. Zambounis, 251 N. Y. 94, 97. From this it would appear that whenever the trial court denies a fundamental right it is incorrect for the appellate court to hold the error harmless.

The opinion by the U. S. Court of Appeals for the Second Circuit also suggests that the quashing of the subpoena was harmless because the defendant, even so, was not denied the opportunity to subpoena political leaders who had supposedly behaved similarly to the defendant. Since "no leaders were ever produced" the Court of Appeals concludes that to deny the subpoena directed at the District Director was harmless error. This reasoning, however, overlooks trial rules of evidence. Such evidence would have been inadmissible. It would have been pointless and very expensive to subpoena political leaders from distant areas of the United States without first establishing the defendant's claim that no other prosecutions for similar activities had ever occurred because the Internal Revenue Service had held that such funds were not taxable income. In Bandy v United States a defendant was indicted for filing false

income tax refund claims. The claims were filed in North Dakota, but the defendant was not allowed to introduce evidence that he was in New York City at the time the District Director for North Dakota received them. The reason for inadmissibility was that since the envelopes in which the claims were mailed no longer existed, it was impossible to determine from what location they were sent. Thus no foundation had been laid and the proposed evidence was inadmissible. Bandy v United States 296 F 2d 882,

Since it would not avail the defendant to subpoena political leaders without first laying a foundation by showing that diversion of political funds had not been treated as a source of income, the opportunity to lay a foundation is not harmless error on the grounds that no political leaders were produced.

QUESTION PRESENTED: No. 3

If a defendant is indicted for income tax evasion and the government tries to prove its case by the net worth method, is it reversible error for the court to deny

admission of records kept by the defendant which show that the increase in net worth was from a non-taxable source, political contributions?

POINT:

IF THE DEFENDANT IN AN INCOME TAX EVASION CASE SEEKS TO PROVE THAT HIS INCREASE IN NET WORTH IS FROM A NON-TAXABLE SOURCE, NAMELY, THE DIVERSION OF POLITICAL CONTRIBUTIONS TO PERSONAL USE AND FOR THIS PURPOSE, ATTEMPTS TO INTRODUCE AS EVIDENCE THE RECORDS HE KEPT OF POLITICAL CONTRIBUTIONS, AND IF THE GOVERNMENT'S PROOF IS BASED ON THE NET WORTH METHOD, IT IS REVERSIBLE ERROR TO DENY THE ADMISSION OF THE RECORDS.

In this case the government tried to show willful income tax evasion for the years 1960-61 by the net worth plus non-deductible expenditures method. There was a controversy over how the increase had come about, whether it had resulted from the embezzlement of political funds or some other method. The defendant in his capacity as chairman of the Democratic Party of the City of Cohoes had kept books related to political contributions recording the name of the contributor in English and the amount contributed in Japanese. He sought to introduce these books along with the testimony of a translator. In

reviewing the trial court's refusal to admit, the United States Court of Appeals reasoned that although the books may well have been admissible under either the business records rule or the shop book rule, their exclusion was harmless error. It reasoned, "the detail in the diaries was not the core of the controversy. The Government contested neither the fact that appellant received political contributions nor the validity or accuracy of the amounts the appellant testified the Japanese symbols disclosed were contributed; the controversy was over whether any of the political contributions so received by appellant had been converted to his own use". This conclusion is not correct. The question was not centered only on the possibility that the defendant had embezzled political contributions but was more general since the government's proof suggested a number of ways by which he may have obtained unreported income. It is quite possible that the jury found the defendant guilty on the charge, not on the theory that he had embezzled political funds but rather because he had some other undisclosed income. Admission of the books might have shown that if the

defendant did have a suspicious increase in net worth, it resulted exclusively from the political contributions, something which he was then prepared to show has always been considered a non-taxable source.

There is still another reason for prejudice. During the trial, the government's lawyers made references to the defendant's failure to keep adequate records and implied to the jury that this failure could be used to infer guilt. Admission of the defendant's books would have shown that he did keep records and was not irresponsible as the government implied.

If there is a reasonable possibility that the jury was swayed by the error, it is prejudicial. In Kolteakos v U.S. 328 U.S. 750, 765 it is said, "But if one cannot say, with fair assurance, after pondering all that happened without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected."

QUESTION PRESENTED: No. 4

If, in a tax evasion trial, the government introduces by means of a series of charts keyed to the testimony already introduced summaries of the taxable income it claims defendant received, and showing income for which it is claimed defendant should have reported income taxes due, the summaries being computed by the net worth plus non-deductible expenditures method, is it proper for the trial court to deny admission to defendant's own interpretation of the summaries of his income by the use of the same charts but showing wherein defendant disagrees with the government's summaries and that he had actually overpaid upon his taxes, on the ground that such proof is improper because defendant was not an expert and defendant might try to introduce this proof later in the trial?

POINT:

IF THE GOVERNMENT, IN A TAX EVASION CASE, INTRODUCES SUMMARIES OF THE TAXABLE INCOME IT CLAIMS DEFENDANT RECEIVED IN CERTAIN YEARS AND COMPUTES THEM BY THE NET WORTH PLUS NON-DEDUCTIBLE EXPENDITURES METHOD, THE DEFENDANT IS ENTITLED TO DENY AND ANSWER SUCH CONCLUSIONS BY GIVING HIS INTERPRETATION OF THE EVIDENCE BY SHOWING THAT WHICH HE ADMITS, DENIES OR

DISTINGUISHES AND TO MAKE UP HIS OWN SUMMARIES TO CLARIFY THIS TO THE JURY. IT IS, FURTHERMORE, IMPROPER TO REJECT THE DEFENDANT'S INTERPRETATIONS AND DISTINCTIONS OF THE GOVERNMENT'S SUMMARIES AS EVIDENCE ON THE GROUNDS THAT THE ORDER OF PROOF IS IMPROPER.

In this case the government introduced net worth plus non-deductible expenditures summaries to show income tax evasion for the years 1960 and 1961. When the defendant attempted to introduce his own interpretations of these summaries, which involved the figures and conclusions upon the government charts, but explained them differently, they were rejected. The trial judge indicated that he believed the order of defendant's proof was improper because he must first give his testimony relative to the facts upon which the summary was based.

This was error, The defendant had a right to deny any and all charges made against him by the government. HE WAS THE DEFENDANT. He was not necessarily summarizing his testimony but was attempting to explain to the jury why the chart, already admitted in evidence, was not correct. The government by the introduction of this many-paged chart had opened the door for this action on

the part of the defendant. In Lloyd v U. S., for example, it is said:

"Practical problems...encountered both by the government and the accused in presenting this too often confusing and complex...proof still justify the use of illustrative charts by both sides to summarize their varying computations..." Lloyd v. U. S. 226, F 2d, 9.

Furthermore, it has been observed in Holland v U. S. 348 U. S. 121 that the technique of proof involved goes beyond the bounds of ordinary uses of circumstantial evidence and is unfair to the defendant because it shifts the burden onto the taxpayer once an increase in income is shown. This means that the defendant should receive special consideration when he offers evidence. There is a rule that if incompetent evidence is admitted and does harm the adversary is entitled to answer it as of right, State v Witham 72 Me 531, 555.. It seems only fair in light of this that when the Government introduces this burden-shifting unfair evidence, there should be an "opening of the door" so that the defendant may introduce his own interpretation of the government's net

worth summaries so as to contradict. When the government has an unfair evidenting tool at its disposal, the defense should not be restricted as to what time in the defense's use it can make a denial of the validity of the government's inferences.

We also maintain that the testimony requested by the trial was not a foundation for the summary charts. These summaries were intended to show how the defendant disagreed with the government. They were not dependant upon a prior testimony. They were properly admissible because the government had "opened the door" when they introduced them in evidence.

QUESTION PRESENTED: NO. 5

If a defendant in a tax evasion case had been convicted of tax fraud for the year 1961 and if it appears that the conviction rested on the theory that the income he did not report consisted of political contributions given to him while he was chairman of the Democratic Party of the City of Cohoes, that he used in a corporation which published a newspaper espousing the democratic cause, but

in which he owned a substantial interest, did this change the nature of these funds from non-taxable to taxable and under what circumstances does such a conversion take place?

No. 5

THE DEFENDANT SHOULD NOT HAVE BEEN CONVICTED OF FAILING TO REPORT AS PERSONAL INCOME MONEY GIVEN TO HIM AS POLITICAL CONTRIBUTIONS REGARDLESS OF HOW HE USED SAID FUNDS SO LONG AS IN SOME WAY THEY WERE USED, IN HIS JUDGMENT, FOR THE FURTHERING OF THE BEST INTERESTS OF THE DEMOCRATIC PARTY IN THE CITY OF COHOES. SUCH CONTRIBUTIONS ARE NOT TAXABLE FUNDS AND CANNOT BE THE BASIS OF A CONVICTION. THIS IS A QUESTION ARISING MORE AND MORE THROUGHOUT THE NATION AND SHOULD NOW BE DEFINED AND CLARIFIED.

A reading of the opinion by the United States Court of Appeals for the second circuit gives the impression that they considered the defendant's unreported source of income to be solely the political contributions he converted. The jury's decision was found reasonable on that basis. Thus the court explains that there is no contradiction between a verdict of not guilty for 1960 and guilty for 1961 on the theory that James v United

States 366 U. S. 213 was applicable (pages 3370-71) They also seem to feel that "the controversy was over whether any of the political contributions so received by appellant had been converted by him to his own use (Page 3372). If we assume arguendo, however, that the only unreported source of income in 1961 was the political contributions, there must be a reversal because statements by the Internal Revenue Service and previous failure to prosecute show that such a source was considered non-taxable.

That the defendant showed poor judgment in placing the funds in a printing and publishing business which was furthering the cause of the Democratic Party in the City of Cohoes does not convert these funds from political funds to personal funds.

That tax payer has the burden of proof in establishing a proper disposition of such funds, see O'Dwyer v. CIR 28 TC 698 (1957), aff'd. 266 F. 2d 575. And see 3 AFTR 2d 1395, citing 13 FTR 1019, for the proposition that if the taxpayer can establish a proper disposition of money given to him as a political contribution, such money is not taxable income.

QUESTION PRESENTED: No. 6

When, in a tax evasion case, the government's own testimony clearly shows that a second audit of the taxpayer's records was made without fulfilling the requirements of Section 7605 (b) of the Internal Revenue Code, is it error for the trial judge to refuse to suppress all evidence resulting from the second audit.?

PRINCIPLE: WHEN THE GOVERNMENT'S OWN TESTIMONY IN A TAX EVASION CASE INDICATES BEYOND DOUBT THAT A SECOND AUDIT OF THE TAXPAYER'S RECORDS WAS MADE WITHOUT FIRST FULFILLING THE REQUIREMENTS OF SECTION 7605 (b) OF THE INTERNAL REVENUE CODE, IT IS ERROR FOR THE TRIAL COURT NOT TO SUPPRESS ALL EVIDENCE RESULTING FROM THE SECOND AUDIT.

In this case, William Dawson was indicted for tax evasion in 1959. A motion to suppress evidence resulting from a second audit was denied. However, the record shows indisputably that the re-audit was made contrary to the rules in Section 7605 (b) of the Internal Revenue Code (see pages 202--204 of the record). This can be seen from the government's answers to questions as follows:

"The court: Was there an audit made prior to this

particular audit?

The Witness: A one year audit involving the year 1959.....The Court: I don't understand the answer to the question. Whether you were saying yes...whether there was an audit made or whether there was not an audit made.

The Witness: Well, the papers attached to the 1959 return indicate that a single item correspondence type audit had been made

(Pages 202-203 of the record)

"Question: Now, when did you obtain--first, you say you did obtain a reopening letter?

Answer: Yes.

Question: And do you know what the date of that reopening letter was?

Answer: I believe it was April 3rd, 1963.

Question: Now on April 3rd, 1963 you had for all practical purposes substantially completed the audit of Mr. Dawson?

Answer: An investigation of Mr. Dawson's income tax liabilities. I have never prior to that time or on

the date that letter was issued had seen any books of account of Mr. Dawson.

Question: But, Mr. Musoff, at that time it had reached the point when you had made certain recommendations to the department based on figures that you had arrived at?

Answer: I made no formal recommendation at that point.

Question: Did you make a report to your supervisor?

Answer: I made several reports as I testified to".

(Pages 204--205 of the record)

Section 7605 (b) prohibits a second audit if the reopening letter is not sent until after it is made. This is clear from the wording of the statute. Also, when such violations occur, any evidence resulting from such a search must be suppressed. Application of Leonardo 208 F. Supp. 124, 128; Reinman v U. S. 301 F. 2d 267; U. S. v Sawyer 243 F. Supp. 462; U. S. v Florida 252 F. Supp. 806, 810.

THE GOVERNMENT WITNESS IN ANSWER TO THE QUESTION: "NOW ON APRIL 3RD, 1963 YOU HAD FOR ALL PRACTICAL PURPOSES SUBSTANTIALLY COMPLETED THE AUDIT OF MR. DAWSON?" MADE THE ANSWER: "AN INVESTIGATION OF MR. DAWSON'S INCOME TAX LIABILITIES. I HAVE NEVER PRIOR TO THAT TIME OR ON THE DATE THAT LETTER WAS ISSUED HAD SEEN ANY BOOKS OF ACCOUNT OF MR. DAWSON." THIS CLEARLY SHOWS THAT AT A TIME WHEN THE EXAMINATION WAS SUBSTANTIALLY COMPLETED HE OBTAINED THE LETTER OF PERMISSION. IF NO LETTER WAS NECESSARY WHY OBTAIN ONE? THIS IS A VIOLATION OF THE STATUTE AND THE SPIRIT OF THE STATUTE AND THIS COURT SHOULD SO DETERMINE.

The government also attempted to rely on the fact that this previous audit involved only a single item, but this single item arose as a result of a complete examination of the taxpayer's return. This court should clarify the taxpayer's status under Section 7605 (b) which reads: "No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary."

QUESTION PRESENTED: No. 7

Consider a tax evasion case in which the government seeks to prove that the defendant, while serving as a political leader, accepted a payment from a realty company which wanted immediate construction of certain water and sewage facilities by the city, and failed to report the income. If the man who is reputed to have handed over the payment testifies that he gave an envelope containing $1,750.00 in cash, is evidence that some corporation had a cash disbursement on its books noted as "Cohoes for water" admissible and is a corporation cancelled check, made out to cash, admissible as proof of this transaction or is it irrelevant, inadmissible, self serving, pure hearsay.

POINT:

WHEN IN A TAX EVASION CASE THE GOVERNMENT SEEKS TO PROVE THAT THE DEFENDANT ACCEPTED $1,750.00 IN CASH FROM A REALTY COMPANY WHICH WANTED WATER AND SEWAGE FACILITIES INSTALLED AND DID NOT REPORT THIS ITEM IN HIS TAX RETURN THE FOLLOWING EVIDENCE IS INADMISSIBLE:
a) CORPORATION BOOKS SHOWING THAT A DISBURSEMENT MARKED "COHOES FOR WATER" WAS RECORDED.

b) A CANCELED CHECK OF THE CORPORATION MADE OUT TO CASH.

In this case the government wanted to prove income tax evasion by Dawson in 1959. A witness testified that he had given Dawson $1,750.00 in cash because Dawson, at that time chairman of the Democratic Party in the City of Cohoes had the influence to cause certain water and sewage facilities to be installed. To corroborate the testimony the government introduced the books of a corporation in which was recorded a disbursement marked "Cohoes for water" and a cancelled check made out to cash. The defendant made timely objection but the court admitted this evidence.

To admit such evidence was reversible error because it was irrelevant and hearsay. The Court of Appeals justifies the trial court's decision on the grounds that the evidence was business records admissible under 28 U.S.C 1732. However it overlooks the principle that no evidence which is not relevant can be admissible. It has been held, for example, that books of account of a plaintiff showing his dealings with the defendant

are not relevant or material on the question of whether plaintiff had a large amount of cash in a vault, since such books tend only to prove that the plaintiff did not acquire the money from the defendant or through any financial dealings with him, there being many other possible sources from which the money could have been accumulated. Barr v Dolphin Holding Corp. 141 N.Y.S. 2d 906

In this case the same reasoning prevails. The recorded disbursement and the check show only that the corporation paid out mony to some unknown person. They do not in any way suggest that the one who received this money was Dawson. The check is made out to cash. The business entry is marked merely "Cohoes for water" which could have any number of meanings. Since there is nothing in them to link them to Dawson, they are irrelevant and hence inadmissible. However, it is not hard to surmise that such things would easily impress a jury because they are tangible objects. In concluding that Dawson accepted $1.750.00 it is quite probable that the jury relied on them.

All books and records kept in the regular course of a business meet the test of 28 U.S.C. 1732. But before they are admissible at the trial they must be shown to be relevant. Such was not the case herein.

Much confusion seems to reign in this area of the law of evidence. Too much "dicta" in the decisions seems to imply that books and papers kept in the regular course of a business are admissible under 28 U.S.C. 1732. However the basic rules of evidence have not been changed. Irrelevant and immaterial evidence, self serving declarations are not admissible. They do not receive some amount of sanctification which then allows them to become admissible only because someone kept it in some form of book or record. It is important that this court make this clarification of 28 U.S.C. 1732.

CONCLUSION

This Court should grant certiorari, and the judgment below should be reversed.

Respectfully submitted,

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OPINION OF

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 327—September Term, 1967.

(Argued April 29, 1968 Decided August 12, 1968.)

Docket No. 31191

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

WILLIAM J. DAWSON,

Defendant-Appellant.

Before:

WATERMAN, FRIENDLY and KAUFMAN,

Circuit Judges.

Appellant was prosecuted in a three count indictment charging him with having violated 26 U. S. C. §7201 by filing false and fraudulent income tax returns for the years 1959, 1960, and 1961, and thereby wilfully attempting to evade the taxes rightfully due in each of those years. He was convicted on count 1 (the 1959 return) and count 3 (the 1961 return), United States District Court for the Northern District of New York, Port, *J.*, with jury. He appeals his conviction alleging, *inter alia,* various erroneous prejudicial trial rulings, including a ruling permitting the Government to introduce statements made by

appellant to government officers, insufficient evidence to warrant the jury verdict, and an improper charge to the jury. Judgment of conviction affirmed.

JOHN M. BRANT, JOSEPH M. HOWARD, Attys., Dept. of Justice; MITCHELL ROGOVIN, Asst. Atty. Gen.; JUSTIN J. MAHONEY, U. S. Atty., GEORGE B. BURKE, Asst. U. S. Atty., *for Appellee.*

BENJAMIN UNGERMAN, Ungerman & Harris, Albany, N. Y., *for Appellant.*

WATERMAN, *Circuit Judge*:

On April 30, 1965, William J. Dawson, then chairman of the Democratic Committee of the city of Cohoes, New York, was charged in a three-count indictment with having violated Section 7201 of the Internal Revenue Code of 1954, 26 U. S. C. §7201,[1] in that he had wilfully attempted to evade and defeat the income tax owed by him for the years 1959, 1960, and 1961, by filing false and fraudulent joint income tax returns for him and his wife. In May 1966, after a suppression hearing had resulted in no evidence being suppressed, trial commenced in the United States District Court for the Northern District of New York, before Port, *J.*, and a jury; appellant and over one hundred other witnesses testified, and a trial record of more than

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1 26 U. S. C. §7201 reads:

§7201. Attempt to evade or defeat tax

Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.

2300 pages of transcript was built. The jury found Dawson guilty on counts 1 and 3 (1959 and 1961) and not guilty on count 2 (1960). He was sentenced to two years imprisonment on count 1—on count 3 an imprisonment sentence was suspended and three years probation was imposed upon condition that appellant pay any tax arrears for 1959 and 1961. Upon this appeal, appellant makes no less than thirteen distinct assignments of error which range from allegations that the trial court made erroneous evidentiary rulings to a claim that the sentence imposed on count 1 is so excessive that it is cruel and unusual punishment violative of the Eighth Amendment. We hold that no error was committed which was prejudicial to appellant, we affirm the judgment of conviction, and find that the sentence was not unconstitutionally imposed.

Count 1

Under count 1, the Government sought to prove that there were two specific items of income which appellant did not report on his 1959 return. First, the Government attempted to show that appellant had received $1,750 in cash from a business partnership operating under the name Mazra Homes with the result that, a few days after the cash had changed hands, the City of Cohoes began to install water and sewerage facilities for the partnership's real estate development. Both of the partners testified that they gave the money to appellant because they had been told that appellant "ran things" in Cohoes. One partner, Michalik, testified that he went to see appellant, whom he did not know personally, and placed an envelope containing the $1,750 on appellant's desk. The other partner, Rosonoff, testified that he had previously cashed a business check for $1,750 and had given the cash to Michalik to be

passed on to appellant. The Government corroborated this testimony by placing in evidence, over appellant's objection, the canceled check for $1,750 made out to "cash" and the portion of the Mazra Homes books and records which disclosed a cash disbursement of $1,750 on the day in question, noted in the records as "Cohoes for water."

Second, the Government put in evidence that appellant had made a profit of $1,300 on a sale of land in 1959 and had not reported this on his 1959 return. Joseph Simonek testified that he paid appellant $1,500 in cash for a piece of land and later received back $150 because of a defect in the title. Appellant had bought the land six years earlier from the City of Cohoes for $50. One half of this $1,300 long-term capital gain, $650, was taxable. Appellant conceded that he had not included this item in his 1959 return but claimed that property taxes and other expenses he incurred while he owned the property wiped out any profit he may have made on the sale. However, property taxes would have no effect on the amount of capital gain reportable on the sale of appellant's property, and appellant proved no specific items of expense which would have had the effect of increasing the cost basis of the property while it was in his hands.

Appellant's first assignment of error relating to count 1 is that the canceled check and the portion of the books and records of Mazra Homes dealing with the $1,750 transaction were improperly admitted into evidence. He claims the books and records were inadmissible because Michalik, the witness whose testimony supposedly laid the foundation for the receipt of these items, was not the person who kept the books and records and that his acquaintance with those items was limited to knowledge that the books had been kept by an accountant in New York City who was not

a witness. However, Michalik testified that he knew the books and records were kept in the regular course of business of Mazra Homes and that it was in the regular course of the partnership business to keep such records. This testimony was sufficient to make the relevant portions of the books and records admissible under the Federal Business Records Act, 28 U. S. C. §1732(a),[2] for the person who actually keeps the books and records and makes the entries need not testify if a person does testify who is in a position to attest to the authenticity of the records. See, e.g., *United States* v. *New York Foreign Trade Zone Operators, Inc.*, 304 F. 2d 792, 796 (2 Cir. 1962); *Bridger* v. *Union Railway Co.*, 355 F. 2d 382, 391-92 (6 Cir. 1966); *Wheeler* v. *United States*, 211 F. 2d 19, 22-23 (D. C. Cir. 1953), *cert. denied*, 347 U. S. 1019 (1954). The fact that the records offered were essentially self-serving is no bar to their admissibility under 28 U. S. C. §1732. Compare *Lind* v. *Schenley Industries, Inc.*, 278 F. 2d 79, 88 (3 Cir. in banc), *cert. denied*, 364 U. S. 835 (1960). Moreover, canceled checks are clearly admissible to prove that money was drawn from an ac-

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2 28 U. S. C. §1732(a) reads:

> §1732. Record made in regular course of business; photographic copies
>
> (a) In any court of the United States and in any court established by Act of Congress, any writing or record, whether in the form of an entry in a book or otherwise, made as a memorandum or record of any act, transaction, occurrence, or event, shall be admissible as evidence of such act, transaction, occurrence, or event, if made in regular course of any business, and if it was the regular course of such business to make such memorandum or record at the time of such act, transaction, occurrence, or event or within a reasonable time thereafter.
>
> All other circumstances of the making of such writing or record, including lack of personal knowledge by the entrant or maker, may be shown to affect its weight, but such circumstances shall not affect its admissibility.
>
> The term "business," as used in this section, includes business, profession, occupation, and calling of every kind.

count. In any event, no prejudice to appellant can have resulted from the admission of the check and records, for that evidence was purely cumulative to the oral testimony of the parties. Compare *United States* v. *Schabert*, 362 F. 2d 369, 371-72 (2 Cir.), *cert. denied*, 385 U. S. 919 (1966).

Appellant also contends that, on the basis of 26 U. S. C. §7605(b)[3] which statute provides that a second examination of a taxpayer's books and records must be preceded either by the taxpayer's consent to the examination or by a written notification from the Secretary or his delegate, the lower court should have suppressed all government evidence regarding the year 1959 obtained by Internal Revenue Agents' having audited appellant's 1959 returns. There is no merit to this contention for even if one assumes that appellant's records had once been inspected prior to the investigation which resulted in appellant's prosecution, an assumption not conceded by the Government, and even assuming further that the results of a second, unlawful inspection would be excludable,[4] we would

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3 26 U. S. C. §7605(b) reads:

§7605. Time and place of examination

* * * * *

(b) Restrictions on examination of taxpayer.—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.

4 In light of the disposition we make of appellant's contention we need not decide whether violation of 26 U. S. C. §7605(b) should lead to the exclusion of such evidence. This point has apparently not been decided in this court, and other courts are in conflict on it. Compare *Field Enterprises, Inc.* v. *United States*, 348 F. 2d 485 (Ct. Cl. 1965); *Philip Mangone Co.* v. *United States*, 54 F. 2d 168 (Ct. Cl. 1931), with *Reineman* v. *United States*, 301 F. 2d 267 (7 Cir. 1962); *Hinchcliff* v. *Clarke*, 230 F. Supp. 91, 109 (N. D. Ohio 1963); *Application of Leonardo*, 208 F. Supp. 124 (N. D. Cal. 1962).

hold that the lower court did not err in refusing to suppress. Here there was sufficient credible evidence introduced at the suppression hearing to show that, prior to appellant's very first conference with government agents regarding the charges involved in the case, a Section 7605(b) letter was sent to him. What appellant appears to be complaining about is the extensive government investigation into his affairs through interviews with third parties and the checking of public records, bank accounts, and the detail disclosed by the 1959 tax return itself. Such an investigation is not within the ambit of Section 7605(b); the section applies only to a successive inspection of the taxpayer's private books of account. See *Geurkink* v. *United States*, 354 F. 2d 629, 631 (7 Cir. 1965); *De Masters* v. *Arend*, 313 F. 2d 79, 86 (9 Cir.), *cert. dismissed*, 375 U. S. 936 (1963); compare *Application of Magnus*, 299 F. 2d 335 (2 Cir. 1962). Indeed, a preliminary investigation of the type made here is expressly contemplated in the statute: ". . . or unless the Secretary or his delegate, *after investigation*, notifies the taxpayer . . . ." 26 U. S. C. §7605(b) (emphasis supplied); see *De Masters* v. *Arend*, *supra* at 86. Moreover, the evidence in the present case indicates that appellant never permitted the agents to examine his books and records and this fact provides an alternate basis for supporting the trial court's determination; it could have found that there was nothing to suppress because there was no second examination in violation of 26 U. S. C. §7605(b).

Appellant also contends that witness Michalik's testimony that $1,750 graft was paid to appellant is incredible as a matter of law. There is no merit to this claim, for although there were minor inconsistencies in Michalik's testimony and it was brought out that Michalik neither

knew appellant personally nor knew appellant's occupation, it was also brought out that Michalik knew appellant "ran things" in Cohoes. Too, Rosonoff corroborated Michalik. Obviously it was for the jury to decide whether the $1,750 was paid. Appellant apparently overlooks the fact that even if we were to accept all of appellant's contentions regarding the evidence unfavorable to him on count 1, we would still be required to uphold the conviction on that count, for he advances no assignment of error in the reception of the Government's proof that he failed to report his capital gain from the sale of land to Simonek.

This latter observation leads into appellant's final contention regarding count 1, that the sentence imposed thereunder (two years imprisonment), considering the relatively minor tax evasions proved by the Government, was harsh to the point of constituting cruel and unusual punishment in violation of U. S. Const. amend. VIII. The count 1 conviction was under 26 U. S. C. §7201, which provides for a maximum sentence of five years imprisonment or a $10,000 fine or both. It is well settled that a sentence imposed within the limits of a statute cannot amount to cruel and unusual punishment, and that when a statute provides for punishment thought to be violative of the amendment the constitutionality of the statute itself must be attacked. See, e.g., *United States* v. *Rosenberg*, 195 F. 2d 583, 607-09 (2 Cir.), *cert. denied*, 344 U. S. 838, *rehearing denied with mem. opinion*, 344 U. S. 889 (1952); *Martin* v. *United States*, 317 F. 2d 753, 755 (9 Cir. 1963); *Pependrea* v. *United States*, 275 F. 2d 325, 329-30 (9 Cir. 1960). No attack is made on the validity of the statute here. Moreover, it is clear that an appellate court has no power to modify or reduce the sentence, *United States* v. *Rosenberg*, *supra*, 344 U. S. at 890, and 195 F. 2d

at 604-07; *Pependrea* v. *United States, supra* at 329-30. Appellant must seek his relief by filing a motion in the district court for reduction of sentence within the time prescribed by Fed. R. Crim. P. 35.

Counts 2 and 3

While the Government used evidence of specific unreported items of income to prove appellant evaded his 1959 tax liability, it sought to prove evasion of liability for 1960 and 1961 by the net worth plus non-deductible expenditures method.[5] The Government alleged unreported taxable income of $29,588.87 for 1960 based upon a comparison of appellant's reported taxable income for that year with appellant's non-deductible expenditures for 1960 plus the difference between his net worth at the end of 1960 and his net worth at the beginning of 1960. It alleged unreported taxable income of $69,369.77 for 1961 based upon a similar comparison for that year. The amounts of allegedly unreported taxable income for the years 1960 and 1961 corresponded roughly with amounts the Government claimed were invested in those years by appellant for his personal benefit in a closely held publishing corporation, Cohoes Publishing Corporation, in a real estate holding corporation, Cohoes Holding Corporation, and in a Lincoln Continental automobile.[6] As " 'a likely source, from which

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5 The net worth method is described succinctly in *Holland* v. *United States*, 348 U. S. 121, 125 (1954), and in *United States* v. *Costello*, 211 F. 2d 668, 670-71 (2 Cir. 1955) (L. Hand. J.), aff'd, 350 U. S. 359 (1956).

6 The breakdown with respect to these three investments in the years in question was as follows:

	1960	1961
Lincoln automobile	$ 5,500.00	
Cohoes Pub. Corp.	13,900.00	$70,975.00
Cohoes Holding Corp.	11,000.00	2,000.00
Total	$30,400.00	$72,975.00

the jury could reasonably find that the net worth increases sprang,'" *United States* v. *Costello*, 221 F. 2d 668, 671 (2 Cir. 1955), *aff'd*, 350 U. S. 359 (1956), the Government suggested that appellant had been diverting (embezzling) funds from the Democratic City Committee of which he was chairman. The controversy at trial centered around two intermingling points: (1) whether funds obtained from party coffers had been used for appellant's personal benefit or for the benefit of the political party, appellant using his own name in order to cover up the involvement of the political party, and (2) whether appellant had a personal pre-existing source of funds not received as taxable income in 1960 or 1961, being a large amount of inherited money cached in his home, that was available for these investments.

The jury found appellant not guilty on count 2 and guilty on count 3. That the verdict returned for 1960 was "not guilty" and the verdict returned for 1961 was "guilty" can be explained, arguably, by the fact that when the trial judge charged the jury he pointed out the applicability to their deliberations of the holding in *James* v. *United States*, 366 U. S. 213 (1961). In *James*, decided on May 15, 1961, the Supreme Court overruled *Commissioner* v. *Wilcox*, 327 U. S. 404 (1946), where it had been held that embezzled funds are not includable by an embezzler in his reportable gross income, and ruled that embezzled funds were so includable in the return for the year of the embezzlement. James, an embezzler, had not included such funds as part of his gross income. He was prosecuted for income tax evasion and was convicted. On appeal, the United States Supreme Court, though overruling *Wilcox*, the case James relied upon, nevertheless reversed James's conviction on the ground that when he omitted to report the embezzled funds

in his return he was entitled to rely on *Wilcox* and so could not be found wilfully to have filed a false return. 366 U. S. at 221-22. Therefore, here, Judge Port charged the jury that, if they found that the only unreported income of appellant in 1960 resulted from his diversion of political contributions during that year, as a matter of law the element of wilfulness which is a necessary element of a violation of 26 U. S. C. §7201 was not established, and appellant must be acquitted on count 2.[7] No such charge was given for count 3.

Appellant urges that the court should have charged that *James* not only precluded a finding of wilfulness with respect to any failure to report funds diverted in 1960 but the *James* ruling was also applicable to the failure to report diverted funds in the 1961 return. He maintains that whether diverted funds are reportable income must be determined at the time of the diversion; therefore, he urges, he was entitled to rely upon the then-in-force *Wilcox* rule as to any funds diverted before May 15, 1961, the date of the *James* decision, and that, at least with respect to that much of the funds diverted in 1961, he was entitled to a charge that wilfulness could not be found as a matter of law. However, the crucial date, the date of the commission of the crime, is not when the embezzlement takes place, but when the tax return is filed, for the crime of income tax evasion occurs when the return is filed. See

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7 The full text of this portion of the charge is as follows:

With reference to Count Two, 1960, if you find that the only unreported income, if any, resulted from the personal use of committee funds by the defendant during the year 1960, as a matter of law one of the essential elements of the crime cannot be present, that is, the essential element of wilfulness as to the year 1960 has not been established, and you must find a verdict of not guilty as to Count Two. That is, if you find that the only unreported income, if you find there was any, is derived from diversion and embezzlement of political contributions, then you cannot find wilfulness.

Nordstrom v. *United States*, 360 F. 2d 734 (8 Cir.), *cert. denied*, 385 U. S. 826 (1966) (embezzlement May 12, 1961, return filed March, 1962). Appellant filed his return for 1961 well after the *James* decision was handed down and well after he could fairly claim that the rule in that case was a surprise. The trial court's jury instructions relative to count 3 were correct.

Upon his direct examination appellant testified that he kept diaries of those who contributed funds to the party, recording their names in English and the amounts of their contributions in Japanese. Appellant attempted to have his diaries for 1959 to 1961 received in evidence as business records, but the trial court refused to admit them. However, appellant used these diaries to refresh his memory and he orally testified as to their contents. Appellant contends that the exclusion of these records was reversible trial error. Assuming, *arguendo*, that it was indeed error not to admit these records under the Federal Business Records Act, 28 U. S. C. §1732, we believe that error was not prejudicial to appellant, for the detail in the diaries was not the core of the controversy. The Government contested neither the fact that appellant received political contributions nor the validity or accuracy of the amounts the appellant testified the Japanese symbols disclosed were contributed; the controversy was over whether any of the political contributions so received by appellant had been converted by him to his own use. Appellant testified as to the sums he received that he had recorded in Japanese. Because appellant was permitted to use the records to refresh his recollection, the jury was certainly aware that he kept records of contributions, and we perceive no further benefit that appellant could have obtained if the jury had been permitted to inspect the records from

which appellant testified, especially as it does not appear that any juror could read Japanese. If error there were, it was surely not prejudicial error. Compare *United States v. De Sisto,* 289 F. 2d 833, 834 (2 Cir. 1961).

At the conclusion of its case the Government was permitted to introduce into evidence summaries of the taxable income it claimed appellant received in each of the years in question: the summary for 1959 was computed by the specific item method and those for 1960 and 1961 by the net worth plus non-deductible expenditures method. However, when appellant attempted during his direct examination to introduce his own summary of the income he claimed to have received during each of those years, a summary similar in format to those of the Government, the offer of his summary was rejected. The trial judge indicated in the colloquy prior to his exclusionary ruling that he had doubts about the admissibility of a summary absent expert testimony but he only sustained the Government's objection to the summary on the ground that the order of appellant's proof was improper and that he must first give his testimony relative to the facts upon which the summary was based.[8] Appellant thereafter testified at length, but the summary was never offered again. Without determining whether such a summary is admissible with or without expert testimony, we reject appellant's assignment of error because he failed to follow the court's suggestion and did not offer the summary after he had testified to the underlying facts upon which the summary was based.

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8 Mr. Langford: If the Court please, Mr. Ungerman is offering a purported summary of the evidence which he says the defense has established, and the witness isn't even finished with direct examination. This is an untimely offer.

The Court: Objection sustained. There is no basis at this time.

Mr. Ungerman: Exception.

The Court: Have the witness testify to facts, and then I will consider the matter of the summary.

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Appellant also urges that the trial court erred in granting government motions to quash three subpoenas he served during trial. These subpoenas would have required that: (1) the Government produce copies of all rules, regulations, methods and manuals for the guidance and advice of Internal Revenue personnel in the conduct of the investigation of a taxpayer which precedes the decision that the "net worth" method of determining the taxpayer's liability must be resorted to; (2) the District Director or someone under his direction and control familiar with the rules, regulations and procedures involved in the civil or criminal investigation of an individual's income tax liability appear at the trial to testify thereto; (3) the District Director appear as a witness and bring with him "the names of any and all individuals indicted for tax fraud by reason of their receipt of political donations from 1950 to the present." Subpoenas (1) and (2) are substantially the same. Apparently appellant hoped to secure information which would show that the Internal Revenue agents had not been faithful to their own departmental rules in their investigation of appellant, appellant seeking thereby to cast doubt upon the accuracy or bona fides of the Government's allegation of tax evasion. The trial court was well within its discretion in quashing these subpoenas which called for the appearance at trial of the persons summoned with the items commanded to be brought by them. If the subpoenas had not been quashed, the trial would have been bogged down in inquiries unreasonably far afield and widely collateral to the essential question of appellant's guilt. Compare Fed. R. Crim. P. 17(c) and *Gilmore v. United States*, 256 F. 2d 565, 567-68 (5 Cir. 1958). We think this is a proper case in which the Government could utilize the "net worth" method of proof, for the taxpayer's failure to keep adequate books and records cer-

tainly furnishes a sufficient basis, without more, to justify a resort to the "net worth" technique.[9] The record is replete with unchallenged uncontradicted evidence that appellant failed to keep adequate records of his personal finances and of his disbursement of political funds.

Also, the trial court's quashing of the third subpoena was not error. Partially by means of information to be obtained as a result of this subpoena appellant hoped to show that he had been "singled out" for prosecution, i.e., that the tax evasion laws had not been enforced evenhandedly in the Northern District of New York against political leaders who had diverted party funds to their own benefit. Reliance is placed upon *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886) and *People* v. *Utica Daw's Drug Co.*, 16 App. Div. 2d 12, 225 N. Y. S. 2d 128 (4th Dept. 1962). The evidence appellant hoped to obtain from the District Director would prove only half of his contention, namely, that no one had been prosecuted; he would still have to show that unprosecuted political leaders had diverted political funds. At the time the subpoena was quashed defense counsel represented to the court that he had subpoenaed several political leaders who had acted in a manner similar to defendant and had not been prosecuted. The judge, relying upon counsel's representations, then indicated that he would not quash these subpoenas summoning the political leaders, and he further observed that they could also testify whether any assessments of unpaid taxes or claims of tax evasion had ever been made against them, thus making it

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9 Justice Clark's opinion for the Court in *Holland* v. *United States*, 348 U. S. 121 (1954) demonstrates that the classical situation for invoking the "net worth" method of proof is the one where the taxpayer has concealed income by destroying records or by keeping no records. *Id.* at 126, 130-131. In *Holland* it was established that the method may even be used in some situations where the books and records of the taxpayer are apparently adequate. *Id.* at 130-132.

unnecessary to obtain the same information from the District Director.[10] However, no political leaders were ever produced. Therefore, inasmuch as the issue was never reached, we need not pass upon the question as to whether subpoenas such as appellant claimed to the trial judge he had issued ought to be quashed, and, in view of the judge's indication that he would permit such witnesses to so testify if appellant presented them, appellant suffered no prejudice from the quashing of the subpoena that had been issued to summon the District Director.

Finally, in two assignments of error which appear to us to be substantially the same, appellant urges that his motion to set aside the verdict on count 3 as being against the weight of the evidence should have been granted. In short, he contends that the Government did not establish

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10 Mr. Ungerman: On the first subpoena you quashed, it was our intention to prove that there had been a discriminating type of prosecution against the defendant in this action by reason of the fact that there are countless situated similar as he is who have taken political funds, used them as similar as he did, to the knowledge of the Internal Revenue Service at one point and no assessment of tax or any claim of evasion of tax was made against these individuals.

My second offer as proof is that in order to—

The Court: Can you state the individuals to whom you refer?

Mr. Ungerman: I am going to have them on the stand. I have them under subpoena.

The Court: Pardon me?

Mr. Ungerman: I have several under subpoena.

The Court: Then they will be able to supply the information. They know whether they have been indicted.

Mr. Ungerman: Not necessarily whether they have been indicted, whether they have ever been charged with having failed to report taxable income that should have been reported.

The Court: Is there any allegation that they used it for their own purpose?

Mr. Ungerman. That I will have to ask them this question, but I am sure the Court is familiar with the Stratton case.

The Court: I am familiar with the Stratton case which indicates that even though a public officeholder is in a high position as governor of the state, if there is any basis for prosecution it is assumed that the United States will prosecute even though it might be unsuccessful.

beyond a reasonable doubt that the funds given to appellant in good faith as political contributions had not been expended in furtherance of party interests. We should note that whether a jury can find tax evasion beyond a reasonable doubt where the net worth plus non-deductible expenditures method of proof is used is a very difficult determination for an appellate court to make upon a cold record; most of the evidence in such a record is circumstantial and an evaluation of it is often influenced by determinations of witness credibility which we are in no position to review. However, after a thorough appraisal of the record and after viewing the evidence in the light most favorable to the Government as we must after a conviction, we have concluded that there was sufficient credible evidence for the jury to have concluded beyond a reasonable doubt that appellant treated the contributions here involved as his own monies, assumed complete dominion over them, and spent or invested them purely for his own advantage and in his own interest. In view of appellant's conflicting versions as to whose money he had invested in the Cohoes Publishing Corporation, his failure to inform appropriate persons that the investments were really those of the Democratic Committee, his proclivity to commingle the Committee's funds with his own, and his failure to keep adequate records regarding disbursement of party funds, we are unwilling to say that the jury erred in finding that appellant used the political contributions other than in furtherance of party business. Moreover, there is no merit to appellant's additional claim that the prosecution did not adequately distinguish between the funds contributed to appellant in 1960 and those contributed in 1961, and that therefore the jury erroneously may have considered the 1960 contributions as part of the funds not reported in the 1961 return. The argument is not a valid one for these funds were reportable by appellant not

in the year of contribution, but in the year of diversion. Therefore, it was sufficient that the Government show, as it did, that the increase in appellant's net worth from the end of 1960 to the end of 1961 plus the non-deductible expenditures for 1961 was considerably greater than the amount of the income he reported for 1961. Compare *Holland* v. *United States*, 348 U. S. 121, 129 (1954) (steadily increasing net worth must be "reasonably allocated" to the appropriate tax year).

General Points

There remain three general assignments of error. First, it is urged that certain evidentiary materials and certain testimony by government agents resulted from information elicited from the appellant in the absence of his retained counsel at a time the Government knew appellant had a retained counsel, and therefore those materials and that testimony ought not to have been admitted into evidence. He maintains that the exclusion of this evidence is required by the holding in *Escobedo* v. *Illinois*, 378 U. S. 478 (1964), as explained in *Miranda* v. *Arizona*, 384 U. S. 436 (1966). And see *Mathis* v. *United States*, —— U. S. ——, 88 S. Ct. 1503 (May 6, 1968). However, the record discloses[11] that

11 The important pertinent facts gleaned from the record are as follows:

June 28, 1962—Federal agents visited appellant at his office and informed him that his income tax liabilities for 1958-61 were being investigated, that he need not respond to questions which might incriminate him, and that he had a right to counsel. Appellant refused to answer any questions, stating that he wished to have his attorney present.

July 2, 1962—Agents again visited appellant at his office, again told appellant he need not answer any questions, and asked him if he didn't want his attorney there before answering any questions. Appellant replied that he had not been able to reach his attorney but wished his accountant, who was present, to remain during the interview. He answered some questions, mostly dealing

appellant was warned of his right to counsel and his right to remain silent upon each of the first two occasions he was confronted by federal agents in connection with this case, and in fact relied upon those rights at interviews prior to the interviews during which he made the damaging statements later used against him. Moreover, the three interviews during which these damaging statements were made occurred, respectively, at appellant's home, at the office in the Justice Department, Washington, D. C., of the Government's trial attorney in this case, and at the Albany office of the United States Attorney for the Northern District of New York, all at times prior to appellant's indictment and arrest. Thus it appears that there are two basic weaknesses in appellant's argument for exclusion of appellant's admissions. First, on each of these occasions, appellant was neither in custody nor restrained of his free-

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with his personal history, but declined to answer other questions outside the presence of his attorney.

July 25, 1962—Agents visited appellant at his office, interviewed him in the presence of his attorney, and appellant again refused to answer certain questions.

March 13, 1963—Agents interviewed appellant at the office of and in the presence of his attorney.

April 12, 1963—Agents visited appellant at his home to deliver a letter from the Regional Office of the Internal Revenue Service germane to the investigation. Appellant asked them how the investigation was coming along, to which they responded there was a discrepancy between net worth and reported income, and appellant thereupon made some of the statements later used against him.

October, 1964—Appellant, having requested an appointment, visited the Attorney prosecuting his case at the Justice Department in Washington, and told him he came without counsel because his counsel wanted an additional fee of $10,000 for making the trip to Washington. He then made additional statements which were used against him at trial.

April 7, 1965—Appellant, alone, met with a federal agent and the United States Attorney for the Northern District of New York at the latter's office in Albany and again made damaging statements later used against him.

dom of action in any significant way, so that the inherently compulsory surroundings which put the privilege against compelled self-incrimination in jeopardy did not exist in this case; therefore the *Escobedo-Miranda* exclusionary rule has no application here. As we noted quite recently, "the view that the *Miranda* requirements do not apply to noncustodial questioning by IRS agents has been adopted by every Court of Appeals which has passed on this question and by a majority of the District Courts which have done so." *United States* v. *Squeri* (2 Cir. July 24, 1968). And see cases cited therein. Second, appellant was informed of his right to counsel at both his first and second confrontations with revenue agents[12] and in fact invoked that right several times; this indicates that he was consciously aware of the right. The fact that he abandoned his earlier tight-lipped policy toward revenue agents and spoke freely at his later confrontations with them is unquestionably a conscious, intelligent waiver of his known constitutional rights. We cannot agree that he traveled all the way to Washington, or even to Albany, without counsel, just to inform the Government that he had no counsel with him.

Appellant's penultimate point is that the trial court erred at the pre-trial suppression hearing in refusing to suppress certain information and materials, which he alleges the Government obtained from him through deceit, fraud, and trickery, and to suppress the "fruits" thereof.

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12 Because trial in this case was commenced prior to June 13, 1966, the date *Miranda* v. *Arizona*, 384 U. S. 436 (1966), was handed down, we are not concerned that the warnings prescribed in *Miranda* were not given here *in haec verba*. See *Johnson* v. *New Jersey*, 384 U. S. 719 (1966). With that in mind, we need only pass upon appellant's limited contention that he should not have been questioned unless in the presence of his counsel.

He maintains that, during the investigation which preceded this prosecution, there was an oral agreement between federal agents and his then-counsel whereby he would hand over certain papers and records to the agents in exchange for whatever information the Government had already collected on the case, so that a compromise might be worked out, but that, after appellant had complied, the Government had reneged on its part of the bargain. The evidence on this point at the suppression hearing was in conflict and the court resolved the conflict by finding that appellant had voluntarily turned the materials over to the Government for photostating. Appellant suggests no basis upon which to upset this finding of fact, and we have discovered none in the record.

Also, we reject appellant's last suggestion that unfavorable publicity prevented him from having a fair trial. At the end of each court session the judge painstakingly admonished the jury to avoid reading about the trial in newspapers or listening to accounts of it on radio or on television. Moreover, during the trial appellant's trial counsel failed to call the allegedly adverse publicity to the attention of the trial court and failed to request that the court adopt any protective measures, nor did appellant move for a mistrial or a new trial on this ground, nor ask that the jury be sequestered, nor even ask that the jury be polled in order to discover whether any juror had disobeyed the judge's admonitions. This issue may not be raised for the first time on appeal. Compare *United States* v. *Ragland*, 375 F. 2d 471, 476 (2 Cir. 1967), *cert. denied*, 390 U. S. 925 (1968) (claim of excessive pre-trial publicity must be raised before or during trial). In any event, the stories about appellant's trial were apparently true, though typically written for newspaper readers, and appellant fails to

cite a single instance in which the information made public differed from the evidence presented in court.

We would be remiss not to add a short note commending the trial judge for the conduct of this case. Although the trial was lengthy and aroused great public interest, and the facts and issues were quite complex, he at all times maintained absolute control of the proceedings. As can be seen from our discussion of the issues presented to us and from our rulings thereon, he was always attentive to the issues presented to him and was effectively incisive in dealing with trial counsel's arguments.

The conviction is affirmed.

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UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

United States of America,

Plaintiff-Appellee,

-v-

William J. Dawson,

Defendant-Appellant.

A petition for a rehearing having been filed herein by counsel for the appellant,

Upon consideration thereof, it is

Ordered that said petition be and it hereby is denied

Sterry R. Waterman

Henry J. Friendly (SRW)

Irving R. Kaufman

U.S.C.JJ.

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327-259—68

In the Supreme Court of the United States

OCTOBER TERM, 1968

No. 718

WILLIAM J. DAWSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a–22a) is reported at 400 F. 2d 194.

JURISDICTION

The judgment of the court of appeals was entered on August 12, 1968. A petition for rehearing was denied on September 9, 1968. By order of Mr. Justice Harlan, the time for petitioning for a writ of certiorari was extended to and including November 8, 1968, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether certain statements voluntarily made by petitioner during an investigation of his tax liability should have been suppressed because his attorney was not present.

2. Whether prejudicial error occurred in quashing a subpoena requiring the appearance of the District Director of Internal Revenue as a witness at the trial.

3. Whether it was prejudicial error to exclude from evidence petitioner's diaries listing political contributions, even though petitioner was permitted to testify concerning the amounts of contributions as recorded in the diaries.

4. Whether it was reversible error for the district court to refuse to admit petitioner's net-worth summaries in evidence, when they were offered before an evidentiary foundation had been laid and were not offered for admission thereafter.

5. Whether sufficient evidence supported the jury's finding that petitioner had unreported income in the form of political contributions that he diverted to his personal use.

6. Whether any evidence should have been excluded because allegedly obtained by means of a second examination of petitioner's records in violation of Section 7605(b) of the Internal Revenue Code of 1954, which first requires an official notice of the need for re-examination.

7. Whether it was reversible error for the district court to admit in evidence certain business records of third parties, tending to corroborate testimony concerning a bribe received by petitioner.

STATUTES AND REGULATION INVOLVED

The Internal Revenue Code of 1954 provides in pertinent part:

> SEC. 7201. Attempt to evade or defeat tax.
>
> Any person who willfully attempts in any manner to evade or defeat any tax imposed by this title or the payment thereof shall, in addition to other penalties provided by law, be guilty of a felony and, upon conviction thereof, shall be fined not more than $10,000, or imprisoned not more than 5 years, or both, together with the costs of prosecution.
> [26 U.S.C. 7201.]
>
> SEC. 7605. Time and place of examination.
>
> * * * * *
>
> (b) *Restrictions on Examination of Taxpayer.*—No taxpayer shall be subjected to unnecessary examination or investigations, and only one inspection of a taxpayer's books of account shall be made for each taxable year unless the taxpayer requests otherwise or unless the Secretary or his delegate, after investigation, notifies the taxpayer in writing that an additional inspection is necessary.
> [26 U.S.C. 7605.]

Rev. Rul. 54–80, 1954–1 Cum. Bull. 11, provides in pertinent part:

> Advice is requested whether that part of the political contributions received by a political organization or an individual seeking political office which is diverted to the personal use of the candidate or other individual constitutes

taxable income to such candidate or other individual.

Contributions to political organizations are customarily made with the intent and understanding that they be used for the expenses of a political campaign or for some similar purpose. Such contributions are not deductible for Federal income tax purposes by the donor. See I. T. 3276, C. B. 1939–1 (Part 1), 108.

Where a political gift is received by an individual or a political organization and it is held or used for the purposes intended, i.e., for present or future expenses of a political campaign or for some similar purpose, it is not taxable income to the recipient. See I. T. 3276, *supra.* However, any amount diverted from the channel of campaign activities and used by a candidate or other individual for personal use constitutes taxable income to such candidate or other individual for the year in which the funds are so diverted. * * *

STATEMENT

Petitioner was indicted in three counts for willful attempts to evade the income tax owed by him for the years 1959, 1960 and 1961 by filing false and fraudulent joint income tax returns in violation of Section 7201 of the Internal Revenue Code of 1954, *supra,* p. 3. After a jury trial, petitioner was found guilty on the counts concerning the years 1959 and 1961 and not guilty on the count concerning 1960 (Pet. App. 2a–3a.)

Under Count I, covering 1959, the government introduced evidence showing that after petitioner—as

chairman of the Democratic Committee of the city of Cohoes, New York—received a $1,750 bribe, he failed to include this amount on his income tax return. The government also established that he similarly failed to report a gain of $1,300 on the sale of real estate (Pet. App. 3a–4a.)

Under Counts II and III, concerning petitioner's returns for the years 1960 and 1961, the government sought to demonstrate that petitioner had had unreported income by using the "net worth plus nondeductible expenditures method." By this approach it was shown that petitioner had had unreported taxable income of $29,588.87 for the year 1960 and $69,369.77 for the year 1961, consisting largely of amounts invested by petitioner in a newspaper publishing business, in a real estate holding company, and in the purchase of an automobile (Pet. App. 9a).

Petitioner conceded that the investments were made, but testified that his investment in the newspaper and his purchase of a Lincoln Continental automobile represented a non-personal use of political funds and that his other investments came from a previously-accumulated cash hoard of about $50,000 (R. 711, 1954–1963, 1980, 1993, 2026–2028, 2107–2140, 2162).[1] The court of appeals reviewed the evidence and concluded that there was sufficient credible evidence for the jury to conclude beyond a reasonable doubt that petitioner "treated the contributions here involved as his own

[1] "R." refers to the appendix to petitioner's brief in the court of appeals; "Supp. R." refers to the appendix to the government's brief in that court.

monies, assumed complete dominion over them, and spent or invested them purely for his own advantage and in his own interest" (Pet. App. 17a).[2]

ARGUMENT

The petition raises no issue of law not fully and correctly disposed of by the court below. Further review is not warranted.

1. Petitioner contends (Pet. 14–21) that his constitutional right to counsel was violated and that the canons of legal ethics were transgressed when representatives of the government permitted him to speak at conferences without the presence of an attorney. For a variety of reasons, this contention is baseless. All of his encounters with federal officials pre-dated his indictment, and the undisputed facts conclusively show, as the court of appeals observed (Pet. App. 19a–20a), that petitioner was repeatedly warned of his right to counsel, on various occasions refused to talk to agents, and was at no time "restrained of his freedom of action in any significant way." Although he had retained counsel, he twice *sought* to speak with government officers when he knew his counsel would not be present (Pet. App. 19a, n. 11). He requested and was granted a conference in Washington, D.C.,

[2] The court below surmised that the jury acquitted petitioner on count two because of a finding, permitted by the district court's instructions, that petitioner's failure to include these amounts on his 1960 return was not "wilful", because it was not until May 15, 1961, that this Court, in *James* v. *United States*, 366 U.S. 213, overruled prior case law and held that the proceeds of embezzlement or conversion *are* taxable income. The return for 1961 was filed long after *James* settled the includability of such income (Pet. App. 10a–12a).

and arrived without his attorney (R. 2126; Supp. R. 96–98; Pet. App. 19a, n. 11). Similarly, he requested and was granted a conference with the United States Attorney at Albany, New York (Supp. R. 96–98; Pet. App. 19a, n. 11). In fact, he even insisted on talking about the investigation with revenue agents, over their objections (R. 1148).

Obviously petitioner's reliance on *Escobedo* v. *Illinois,* 378 U.S. 478, *Miranda* v. *Arizona,* 384 U.S. 436, and *Massiah* v. *United States,* 377 U.S. 201, is misplaced. On each occasion during which petitioner made incriminating admissions, he either had counsel present, or had himself sought the conference, or had at least initiated the discussion of the investigation. See *Miranda, supra,* 384 U.S. at 478. It is undisputed that he was never "in custody" in any sense, and in any event, can not rely on the detailed requirements of *Miranda* because his trial began prior to the decision in that case (Pet. App. 20a, n. 12), see *Johnson* v. *New Jersey,* 384 U.S. 719.

As for the claim that the canons of ethics were violated, it seems plain, first, that these cautions are not necessarily of constitutional dimension and, second, that they do not forbid a public official's granting of a *request* for a hearing or interview by a citizen who insists on coming without counsel.

2. Petitioner contends (Pet. 22–30) that the district court erred in quashing a subpoena served on the District Director of Internal Revenue, by whose testimony petitioner had hoped to show that other political leaders who had diverted political funds to their own use had not been prosecuted and thus that his prose-

cution was arbitrary.[3] He contends that such a showing of alleged discrimination would have constituted a valid defense to this prosecution and that it was an issue for the jury to decide (Pet. 25).

Without deciding whether a discriminatory prosecution should be dismissed, the court of appeals correctly concluded that petitioner in any event suffered no prejudice (Pet. App. 16a). Petitioner represented to the district court that he had also served subpoenas on several political leaders who would testify that they had similarly diverted funds but had not been charged with failing to report income (Supp. R. 70; Pet. App. 15a). As the court of appeals noted (Pet. App. 15a–16a), the trial judge properly ruled that evidence that there had been no similar prosecutions would become relevant only after proof that similar offenses had occurred. The judge indicated that he would allow such witnesses to testify as to whether they had been prosecuted, and that it would therefore be unnecessary to summon the district director to furnish the same information. But since petitioner never produced such evidence by calling other political leaders, despite his representation, he cannot now

[3] Yet petitioner's counsel himself cited to the district court (Pet. App. 16a, n. 10) the case of *United States* v. *Stratton* (N.D. Ill.), decided March 10, 1965 (65–1 U.S.T.C., par. 9289), involving prosecution of the former Governor of Illinois. As to the taxability of political funds diverted to personal use, see Rev. Rul. 54–80, 1954–1 Cum. Bull. 11, *supra*, pp. 3–4; *O'Dwyer* v. *Commissioner*, 266 F. 2d 575, 584–586 (C.A. 4), certiorari denied, 361 U.S. 862; *United States* v. *Jett*, 352 F. 2d 179, 182 (C.A. 6), certiorari denied, 383 U.S. 935; *Reichert* v. *Commissioner*, 19 T.C. 1027, affirmed on other grounds, 214 F. 2d 19 (C.A. 7), certiorari denied, 348 U.S. 909.

contend that he was prejudiced because the subpoena against the district director was not enforced.

3. Petitioner contends (Pet. 31–33) that the district court committed prejudicial error by excluding diaries in which he had recorded political contributions with the names of contributors in English and the amounts in Japanese. There was no prejudice since petitioner was allowed to use the diaries to their full effect by informing the jury of what they showed, *viz.*, that he received $36,509 in 1959, $31,655 in 1960, and $27,390 in 1961 (R. 1949–1953). Furthermore, admission of the diaries themselves would have added nothing to petitioner's testimony, since "it does not appear that any juror could read Japanese" (Pet. App. 13a). Moreover, despite petitioner's assertion (Pet. 33), admission of the diaries would not have tended to refute the prosecutor's remarks concerning the inadequacy of his financial records. Those remarks (Supp. R. 102–110) were directed to the concededly fictitious records of petitioner's newspaper business and his real estate holding company (Supp. R. 27–30, 37–38; R. 1963, 2004–2009, 2048–2051) and to the fact that no records of petitioner's detective agency were ever produced (Supp. R. 42–43, 56–59, 62–63, 69).

4. Nor was there prejudicial error in the trial court's refusal to admit into evidence a net-worth summary offered in the midst of petitioner's direct examination and before (see R. 2022, lines 1–4) evidence had yet been introduced to support all the alleged facts which the summary purported to reflect. The district court sustained the government's objection on the ground that petitioner had first to testify

to the underlying facts; petitioner thereafter testified at length, but the summary was never offered again (Pet. App. 13a; R. 2022–2024). The court below correctly rejected this claim of error, on the ground that petitioner "failed to follow the [trial] court's suggestion and did not offer the summary after he had testified" (Pet. App. 13a).

5. The district court correctly instructed the jury, without objection, that a political contribution "received by a political organization is not taxable to the recipient at the time received so long as it is expended for some purpose consistent with its initial donation or solicitation," but that if it is diverted to personal use by the recipient "then such diverted fund at that time constitutes taxable income to such person who converted them to their own use" (Supp. R. 110–112). The court of appeals "after a thorough appraisal of the record" concluded that there was "sufficient credible evidence" for the jury to find that petitioner converted political contributions to his own use (Pet. App. 17a). Now, petitioner seems to contend (Pet. 38–39) that the evidence showed only that he used poor judgment in the way he spent the party's funds and that as a matter of law the diversions did not constitute taxable income. If petitioner means that his purely personal attitude is the final criterion for taxability, the contention is clearly without merit and is fatally inconsistent with his acquiescence in the court's contrary instructions to the jury. If he means that a reasonable jury could not find that he diverted the monies to his own use, he is merely asserting his own interpretation of the facts in the face of the contrary

conclusion by the court of appeals. In either event, neither possibility presents an issue for this Court's attention.

6. Nor is certiorari warranted on petitioner's contention that evidence should have been excluded because it was obtained from a second examination of his books and records without a notice of the need for such re-examination, as provided in Section 7605(b) of the Internal Revenue Code of 1954 (*supra,* p. 3).

While the court of appeals noted (Pet. App. 6a, n. 4) that there is a conflict as to whether the absence of a Section 7605(b) notice would require suppression of evidence, the court here found it unnecessary to reach that question. Before petitioner's first conference with government agents a Section 7605(b) notice *was* sent to him (Pet. App. 7a; Supp. R. 6–9). Furthermore, even after that notice was sent, petitioner refused at any time to allow the agents to examine his books and records (Supp. R. 42–43, 56–59, 62–63, 69), except that his attorneys at one point submitted some cancelled checks for examination (Supp. R. 2). Thus the court below ruled alternatively that the refusal to suppress was supportable on the theory that there had been in fact no "second" examination (Pet. App. 7a).

7. Two partners in the home-construction business testified that in 1959 one of them had paid petitioner $1,750 in cash as a bribe. In corroboration, the district court admitted into evidence a cancelled check in that amount drawn on the partnership account, which one partner testified had provided the cash given to the other partner for paying the bribe. They testified that the bribe was offered to induce the city

of Cohoes to install water and sewerage facilities for the partnership's real estate development. The partnership records, showing a payment of $1,750 as "Cohoes for water" were also admitted (R. 423–429, 449, 473, 478–480; Govt. Ex. 36). Petitioner contends (Pet. 44–47) that the check and the records were irrelevant, and should have been excluded because only *relevant* documents are admissible under the Business Records Act, 28 U.S.C. 1732(a). We concede that point of law, but as the court below held (Pet. App. 5a), the testimony of the partners made the exhibits relevant. In any event, as the court below noted, no prejudice could have resulted, "for that evidence was purely cumulative to the oral testimony of the parties [*i.e.*, the two partners]" (Pet. App. 6a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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